

Before the
SURFACE TRANSPORTATION BOARD

DOCKET NO AB 865-X

HONEY CREEK RAILROAD, INC -ABANDONMENT
IN HENRY COUNTY, IN

and

DOCKET NO FD 34869

HONEY CREEK RAILROAD, INC
PETITION FOR DECLARATORY ORDER

**ROBERTS' REPLY TO HONEY CREEK'S MOTION FOR LEAVE TO FILE
REBUTTAL STATEMENT OF FACTS AND LEGAL AUTHORITY**

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Dated June 26, 2007



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On June 22, 2007, Honey Creek Railroad, Inc. ("HCR") filed its motion for leave to file a rebuttal statement in Docket No. FD 34869, where, to date, both sides have filed a single brief as permitted by the Board's rules. Roberts' counsel has not yet received a service copy of the motion, but has copied one off of the Surface Transportation Board ("STB") web site.¹ Although Roberts takes issue with some of the representations made in the motion, Roberts has no objection to an additional brief if the Board thinks the request is well founded and if Roberts is permitted to respond, if necessary, so that both parties are permitted the same number of briefs. HCR also requests an extension to July 11, 2007, in which to file a reply to Roberts' Motion for Consolidation, Reopening and Reconsideration and for Oral Argument.

HCR overstates the scope of Roberts' reply in Docket No. FD 34869. Roberts did not file a 254-page reply. Roberts filed a 32-page Memorandum in Reply. To get to a count of 254 pages, HCR must have counted every page of exhibits to counsel's declaration. So the Board would be able to see the entire record if it wished, those exhibits included complete copies of every deposition transcript, even when the brief referred to only a page or

¹ The June 22, 2007 cover letter for the motion states that it was sent to all counsel of record by fax and by mail. No fax copy was received. The cover letter was received by mail on June 25. The motion itself has never arrived.

two. The same 32-page memorandum supported the alternative motion to reopen Docket No. AB 865-X. HCR has a right under the rules to reply to the request to reopen the abandonment proceeding docket. HCR's motion correctly states that Roberts has no objection to the requested extension of the time on that reply. The only issue is whether an additional brief may be filed in Docket No. FD 34869, or if a single HCR brief can respond to an issue relevant only to Docket No. FD 34869.

It is also incorrect that Roberts' arguments are new or impermissible. The Board has limited jurisdiction. The issues addressed in the reply go to whether the Board has jurisdiction today to issue a declaratory ruling in Docket No. FD 34869. The issue is inherent in any proceeding before the Board. It was completely predictable. It could have been, and should have been, addressed by HCR in its initial brief in support of its motion for a declaratory order when it opened this new finance docket. In July 2006, the Board recognized the legitimacy of the issue when it granted Roberts time to conduct discovery so he could develop the factual record necessary to make the argument. *See Roberts's Reply at 8-9, Doc. 37177 (STB served July 10, 2006).* Jurisdiction is never collateral when raised in this way.

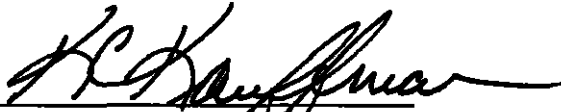
Of course, Roberts does not know what HCR will say in this additional brief or in its rebuttal statement of facts. It may simply seek to

put its own spin on the facts in the record. However, the history of discovery in this case gives grounds for concern. HCR took no discovery of its own. It provided only scant response to discovery requests. Other than a handful of property tax statements, it claimed to have retained no documents other than those in the files of the Indiana Department of Transportation or the STB. *See* Roberts Memorandum in Reply at 9-10. However, six months later, after key depositions were concluded, documents appeared when helpful to HCR. *Id.* Similarly, Norfolk Southern refused Roberts discovery request, but HCR's counsel later produced a purported Norfolk Southern document provided by "contacts" at Norfolk Southern. *Id.* at 5n.10. Finally, the memory of Mr. Smith, HCR's owner and sole customer, failed him at important junctures. *Id.* at 10. If the Board grants permission to file an additional brief and rebuttal statement of facts, Roberts requests that he be granted the right to reply so the record is balanced. If "facts" are asserted that should have been provided in discovery, or which were provided late in discovery, Roberts will file the appropriate motion.

For the reasons stated above, Roberts believes that the Board should permit an additional brief to be filed by HCR in Docket No. FD 34869 only if it thinks the request is well founded and only if Roberts is permitted an additional brief so the record is balanced.

Dated. June 26, 2007

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of June, 2007 served a copy of Roberts' Reply to Honey Creek's Motion for Leave to File Rebuttal Statement of Facts and Legal Authority upon the following via facsimile and first class United States Mail, postage prepaid:

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